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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BARRY JOHN SANFORD, Defendant and Appellant.	A150797 (Humboldt County Super. Ct. No. CR1401326)

Defendant Barry John Sanford appeals a judgment entered upon a jury verdict finding him guilty of continuous sexual abuse of a child under the age of 14, forcible oral copulation of a minor 14 years of age or older, and performing a lewd or lascivious act on a child 14 or 15 years of age. The trial court sentenced Sanford to 22 years in state prison. Sanford contends his rights to due process and a fair trial were violated when the trial court failed to fully re-advise him of the risks of representing himself after additional charges were filed against him. We affirm the judgment.

I. FACTS[1]

Sanford and Tena Beyer had been in a 15-year relationship until the first half of 2013, when Beyer ended it. Before the relationship ended, Sanford lived at Beyer's house and was her caregiver; Beyer was confined to a wheelchair and required assistance. John Doe, Beyer's autistic grandson, stayed with Beyer and Sanford on the weekends

[1] As the facts of the underlying offenses are not relevant to the disposition of the issues on appeal, we provide an abbreviated recitation.

when Doe was 12 to 13 years old. Doe was dependent on others to provide his daily needs and had limited communication skills.

Sanford owned property on the outskirts of Eureka. Beyer frequently took Doe to the property to "hang out with [Sanford]." Sometime in summer 2013, Beyer stopped taking Doe to the property after Doe told her that "[Sanford] had touched his privates." Beyer confronted Sanford about the allegation, which Sanford denied. Beyer did not know who to believe, so in addition to stopping Doe's visits to the property, she decided to closely monitor the contact between Doe and Sanford.

Once while Beyer was driving home with Doe and Sanford, Doe turned to Beyer and said that "[Sanford] needed to cover up his privates"; Doe was in the front passenger seat and Sanford was in the back seat behind Beyer. Beyer was unable to see if Sanford was exposing himself. She pulled over and had Sanford and Doe switch seats. Beyer sometimes heard Doe and Sanford openly joke about and use the term "brongo," but she did not know what it meant.

Doe and Sanford engaged in "inappropriate" behavior when Doe was 12 years old. Sanford and Doe referred to Sanford's penis as "brongo," and he would have Doe suck his penis. Sanford, at times, put his feet on Doe's genitals, and they orally copulated each other "lots of times" at Sanford's property and at Beyer's house; the sexual acts started when Doe was 12 years old and continued until he was 14. Sanford also inserted his finger in Doe's anus when Doe was almost 13 years old and had Doe reciprocate. Doe eventually told Beyer about the sexual acts he and Sanford performed.

While at home one day, Beyer asked Sanford "if he had been inappropriate with [Doe]." Sanford confessed to having inappropriate sexual relations with Doe; he explained that Doe "pursued him and that [he] was weak" and could not resist Doe's advances. Beyer told Sanford to leave her house. Sanford packed his belongings and moved out.

II. DISCUSSION

Sanford contends the trial court's failure to re-advise him of the maximum penal consequences after the new counts were added rendered his previous waiver less than

knowing and intelligent. As such, Sanford argues, the previous waiver was defective under *Faretta v. California* (1975) 422 U.S. 806, 835 (*Faretta*), which provides that a defendant has the right to represent himself as long as the decision to waive the right of counsel is made knowingly and intelligently. In a related argument, Sanford asserts that the trial court violated Penal Code section 987, subdivision (a), by failing to advise him of his right to counsel at the arraignments on the information and amended information.

A. Background

On March 24, 2014, a felony complaint was filed charging Sanford with one count of continuous sexual abuse of a minor. Sanford faced a maximum prison sentence of 16 years if convicted. On September 30, 2015, Sanford completed a *Faretta* waiver form and validly waived his right to counsel after a hearing by the court.

On October 20, 2015, at the then scheduled preliminary hearing, Sanford requested a continuance. Before addressing the motion to continue, the court inquired if Sanford was "still adamant" in wanting to represent himself or if he was agreeable to having an attorney represent him. The court advised Sanford that he was better off with an attorney as this was "a serious, serious case [,]" in which he could go to prison for "a very, very long time." The court further advised Sanford that it was his "choice" if he wanted an experienced criminal defense attorney or if he wanted to represent himself. Sanford elected to continue as his own attorney.

At a December 23, 2015 hearing, Sanford requested a 90-day continuance because he had been representing himself and was still in the process of obtaining court approval for an investigator. Sanford also requested advisory counsel. The court denied the continuance for lack of good cause. The court explained that the case was complicated by the fact that when Sanford signed the *Faretta* waiver he agreed to represent himself without the assistance of an attorney, which included trial, jury selection, motions, and "anything else" that would be required. In response, Sanford asserted that he had not agreed to forgo advisory counsel. The court explained that while Sanford had the right to represent himself, he did not have a right to advisory counsel.

At the same hearing, the court advised Sanford that it was still "early enough in the proceedings that if [he] wish[ed] to have counsel, then the [c]ourt would allow [him] to do that." The prosecutor remarked that although Sanford's maximum possible sentence was 16 years, it did not "preclude the People from adding charges" after the preliminary hearing. Sanford acknowledged that he was aware that charges were added. The court clarified that additional charges had not yet been added; the charging document only listed the original charge with a maximum possible term of 16 years. The court remarked that "[a]fter the preliminary hearing, depending on what's testified to, . . . additional charges can be added" by the prosecutor. At this point, Sanford asked if he could obtain a continuance if he opted for counsel. The court explained that counsel would still have to present good cause for a continuance. The court further admonished Sanford that this was "not a gamesmanship kind of thing. It's not I'll [get] counsel now, and once I get my continuance, I'll withdraw and not want my counsel again."

Following the December 30, 2015 preliminary hearing, the prosecution filed a nine-count information which increased defendant's penal consequences. At the arraignment on January 12, 2016, the following colloquy occurred:

"THE COURT: [D]o you want to continue representing yourself or would you like to consider having an experienced criminal defense attorney represent you?

"[SANFORD]: Thank you for giving me the opportunity to choose, your Honor . . . . No, I'm still standing, still being foolish. Here I am.

"THE COURT: So, I take it from that you want to continue to represent yourself?

"[SANFORD]: That's right.

"THE COURT: All right."

On May 27, 2016, the prosecution filed a motion to file an amended information. At a June 9, 2016 hearing, Sanford indicated that he had not yet received a copy of the proposed first amended information. Sanford asked for two weeks to determine whether or not he opposed the motion.

On July 7, 2016, the court heard Sanford's opposition to the filing of the first amended information. Sanford argued that the amended information triggered a new 60-

day period to bring the case to trial, and as such, he needed additional time. The trial court granted the motion to amend and asked the clerk to file the first amended information. After entering not guilty pleas to each of the charges, Sanford continued to oppose the first amended information, arguing that one of the new counts was "a different charge and it involve[d] more time." The court advised Sanford that it was not reopening the motion.

At a July 20, 2016 hearing, Sanford requested advisory counsel after remarking that he was aware that he no longer faced a possible maximum penalty of 16 years in prison because of new charges filed against him. In seeking advisory counsel, Sanford stated: "the severity of . . . the offenses charged against me have now escalated to the point where I'm no longer a six, 12 or 16 person, but rather a life – 15 years to life, in addition to 60 years if found guilty of all the [a]mended [i]nformation charges leveled at me." The court granted Sanford's request and appointed advisory counsel. On November 21, 2016, the trial court advised Sanford that the maximum possible sentence on count one of the amended information was a life sentence.

B. The Faretta Waiver Was Valid.

The Sixth Amendment to the United States Constitution gives a criminal defendant the right to represent himself or herself. (*Faretta*, *supra*, 422 U.S. at p. 819.) Thus, "[a] trial court must grant a defendant's request for self-representation if the defendant knowingly and intelligently makes an unequivocal and timely request after having been apprised of its dangers." (*People v. Valdez* (2004) 32 Cal.4th 73, 97-98.) However, "[n]o particular form of words . . . is required in admonishing a defendant who seeks to forgo the right to counsel and engage in self-representation. ' "The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." ' " (*People v. Lawley* (2002) 27 Cal.4th 102, 140; see *People v. Burgener* (2009) 46 Cal.4th 231, 241 [reaffirming test]; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 546 (*Sullivan*).)

A criminal defendant bears the burden of demonstrating that his or her waiver was not knowingly and intelligently made. (*Sullivan, supra*, 151 Cal.App.4th at p. 547.) We review the entire record on appeal to determine de novo whether the Sanford's waiver of the right to counsel was knowing and voluntary. (*People v. Conners* (2008) 168 Cal.App.4th 443, 454.)

On appeal, Sanford claims his *Faretta* waiver was invalid because he was not informed of the increased penal consequences associated with the additional counts set forth in the information and amended information. Sanford argues that the Ninth Circuit has long required a defendant to be advised of the maximum potential sentence in order for the defendant to validity waive his right to counsel. (See *United States v. Hantzis* (9th Cir. 2010) 625 F.3d 575, 580-581; *United States v. Erskine* (9th Cir. 2004) 355 F.3d 1161, 1167; *United States v. Harris* (9th Cir. 1982) 683 F.2d 322, 324.) This authority, however, is not binding on us. (*People v. Zapien* (1993) 4 Cal.4th 929, 989 [decisions of lower federal courts are not binding on state courts].) Moreover, at least one court has rejected an argument nearly identical to Sanford's claim of error. (*People v. Harbolt* (1988) 206 Cal.App.3d 140, 149 [concluding advisement of increased penal consequences of amended information not required; "Neither the United States Supreme Court nor any California case we have reviewed *requires* the trial court to specifically advise a defendant seeking to represent himself of the penal consequences."].)

Nevertheless, it is true that several appellate cases have suggested that, for a *Faretta* waiver to be knowing and intelligent, the defendant should be advised regarding the possible penal consequences of conviction. (See *People v. Jackio* (2015) 236 Cal.App.4th 445, 454-455 [concluding a defendant must be advised of the maximum punishment that could be imposed]; *Sullivan, supra*, 151 Cal.App.4th at p. 545 [citing a 9th Circuit case in a general discussion of *Faretta* waivers for the proposition that the trial court must insure that a defendant seeking to represent him or herself understands " 'the possible penalties' "]; see *People v. Noriega* (1997) 59 Cal.App.4th 311, 319 [finding that a trial court had given *no* specific warnings or advisements regarding the

risks and dangers of self-representation, including no advisement regarding "the potential penal consequences if he lost at trial"]; see also *People v. Ruffin* (2017) 12 Cal.App.5th 536, 544 [concluding that, even if a court is not required to "advise of possible penal consequences," the total absence of such an advisement is "certainly a factor to consider in determining whether the defendant's waiver was knowingly made"].) However, we recently considered this issue at length, and, after an exhaustive review of relevant precedent, concluded that a *Faretta* waiver could be valid even if "the court did not specifically advise the defendant of all possible penal consequences of the charged offenses." (*People v. Bush* (2017) 7 Cal.App.5th 457, 473 (*Bush*) Instead, we applied the more general test articulated above—" ' " 'whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case.' " ' " (*Bush, supra,* 7 Cal.App.5th at p. 474.) We do so again here.

The parties do not dispute that Sanford knowingly and voluntarily waived his right to counsel at the outset of the case. At no place in the record is there any indication he ever faltered in his choice. The record as a whole demonstrates that Sanford understood the risks and complexities of self-representation. Prior to the preliminary hearing, Sanford knew he was up against "very serious charges," and that he faced "20 years in prison." Sanford argued that the seriousness of the charges against him warranted advisory counsel, or at least a continuance of the preliminary hearing. Yet, when faced with choice of opting for counsel, Sanford was steadfast in his desire to represent himself. At his arraignment on the information, which added several more charges against him, Sanford declined to avail himself of counsel, telling the court: "No, I'm still standing, still being foolish."

The record also belies Sanford's claim that he did not know he faced increased penal consequences from the new charges. As early as December 2015, the trial court put Sanford on notice that although his then existing maximum possible sentence was 16 years, this could change after the preliminary hearing depending on any new charges that might be added. On July 7, 2016, Sanford opposed the filing of the amended information

because one of the new counts "involve[d] more time." Also, at a subsequent hearing on July 20, 2016, Sanford expressly acknowledged that he faced a longer sentence. In support of his request for advisory counsel, Sanford stated: "the severity of . . . the offenses charged against me have now escalated to the point where I'm no longer a six, 12 or 16 person, but rather a life – 15 years to life, in addition to 60 years if found guilty of all the [a]mended [i]nformation charges leveled at me."

Because the specific factors of this case indicate that, at the time the prosecution filed the information and the amended the information, Sanford understood the nature of his right to counsel, its general application in the circumstances, the nature of the charges, and the general consequences of his waiver, Sanford has not established the trial court violated his Sixth Amendment rights by failing to re-advise him of the right and obtain a renewed waiver of it.

C. Any Violation of Section 987 Was Harmless.

In a related argument, Sandford asserts that the trial court violated section 987, subdivision (a) by failing to advise him of his right to counsel at the arraignment on the original information and amended information. Section 987, subdivision (a) provides, in part, as follows: "if the defendant appears for arraignment without counsel, he or she shall be informed by the court that it is his or her right to have counsel before being arraigned, and shall be asked if he or she desires the assistance of counsel. If he or she desires and is unable to employ counsel the court shall assign counsel to defend him or her."

The record belies Sanford's claim that he was not advised of this right to counsel at the arraignment on the original information. At that hearing, the trial court specifically asked Sanford if he wanted to continue representing himself or if he wanted an "experienced criminal defense attorney" to represent him. As noted, Sanford thanked the court for giving him the option to choose, but elected to continue representing himself. [2]

[2] To the extent Sanford makes the passing argument that he was unaware that he could withdraw his waiver of his right to counsel, the record belies this claim.

On appeal, Sanford argues that the trial court should have conducted a full *Faretta* hearing. Section 987 imposes no such obligation on the trial court, and we decline Sanford's invitation to read such a requirement into the statute.

At the hearing on the amended information, the trial court noted that Sanford was representing himself, but did not expressly advise Sanford of his right to counsel. Assuming, without deciding, that the trial court erred in failing to re-advise Sanford of his right to counsel—contrary to Sanford's contention—this error is not reversible per se. "[W]hen a defendant charged with a felony has been fully and adequately advised at the . . . [arraignment on the complaint] of his or her right to counsel throughout the proceedings (including trial) and the defendant has waived counsel under circumstances that demonstrate an intention to represent himself or herself both at the preliminary hearing and at trial, a superior court's failure to re-advise the defendant and obtain a new waiver of counsel at the defendant's arraignment on the information in superior court, although erroneous under the governing California statute, does not automatically require reversal of the ensuing judgment of conviction." (*People v. Crayton* (2002) 28 Cal.4th 346, 350 (*Crayton*.) We reverse only if we find a reasonable probability that defendant was unaware of his right to be represented by appointed counsel at trial or that he would have accepted the appointment of counsel had the court made the statutorily required inquiry at arraignment. (*Id.* at p. 365, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The California Supreme Court has explained "a trial court's error in failing to comply with section 987 clearly is susceptible to harmless error analysis. The complete record of the trial court proceedings often will shed light upon whether a defendant, despite the absence of an explicit re-advisement by the superior court at arraignment, nonetheless was aware that he or she had the right to appointed counsel at the subsequent proceedings and whether an explicit advisement at the arraignment would have been likely to lead the defendant to reconsider the decision to represent himself or herself and request that counsel be appointed." (*Crayton, supra,* 28 Cal.4th at p. 365.)

Here, any error in not re-advising Sanford of his right to counsel at the arraignment on the first amended information was nonprejudicial because the record

demonstrates that Sanford was aware of his right to counsel and was resolute and unwavering in representing himself. (*People v. Bauer* (2012) 212 Cal.App.4th 150, 157.)

D. The Trial Court Properly Granted the Faretta Motion.

Sanford concedes that, assuming the validity of the waiver, the trial court was compelled under *Faretta* to allow him to represent himself. Nevertheless, he argues at length that *Faretta* was poorly reasoned and should be overturned by the United States Supreme Court. He states that he is raising this issue in order to preserve his right to file a petition for writ of certiorari for that purpose. Since we are bound to follow *Faretta* under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, we must reject this ground for reversal.

III. DISPOSITION

The judgment is affirmed.

_____
Reardon, J.*

We concur:

_____
Pollack, P.J.

_____
Tucher, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.